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Supreme Court of the United States.

OCTOBER TERM, 1943.

WESTERN CARTRIDGE COMPANY, WINCHESTER REPEATING ARMS COMPANY DIVISION,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

AND

BRIEF IN SUPPORT THEREOF.

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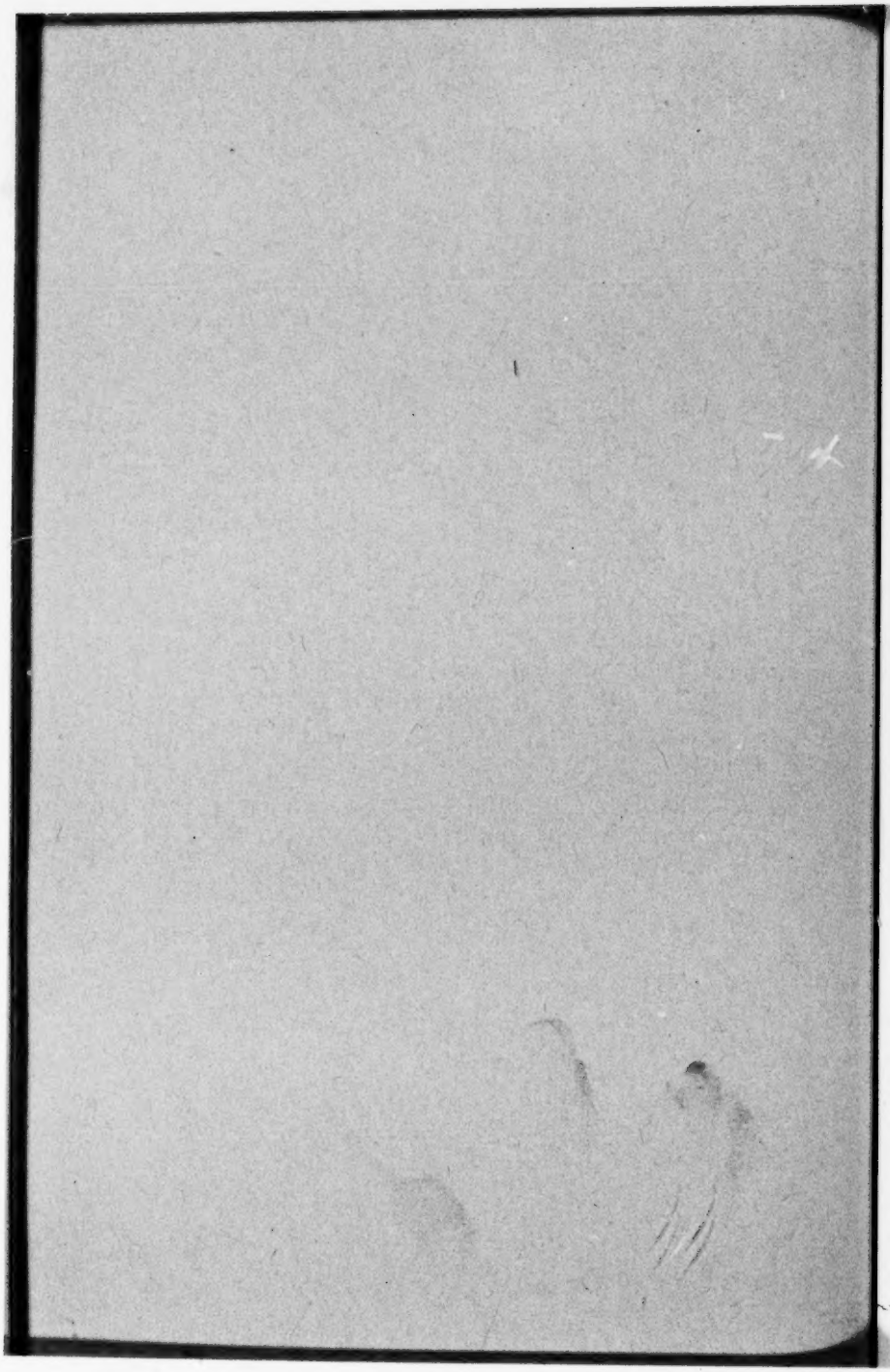

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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Western Cartridge Company, Winchester Repeating Arms Company Division, prays a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit, entered in this cause on November 4, 1943, enforcing the order of the National Labor Relations Board of August 14, 1942, and further ordering the petitioner to notify the Regional Director of the Second Region of the Board in writing within ten days of the Court's decree what steps it has taken to comply with said order.

Question Presented.

Does the fact that the Court's judgment may be justified on the merits obviate the requirement of a fair trial?

Petitioner's Position.

The petitioner's position is that, regardless of the possible outcome on the merits, the petitioner is entitled to a fair hearing and a trial by an unbiased judge.

Statute.

The statute pertinent to this cause is the National Labor Relations Act, 49 Stat. 449, 29 U.S.C. secs. 151-166 (1940).

Statement of the Case.

This case involves the enforcement by the Circuit Court of Appeals for the Second Circuit of an order of the National Labor Relations Board. A more complete statement is in the accompanying brief in support of this petition.

Reasons for Granting the Writ.

The decision of the Circuit Court of Appeals is believed to be in conflict with the applicable decisions of this Court, and more particularly with the decisions of this Court in the cases of *Tumey* v. *Ohio,* 273 U.S. 510; *Ohio Bell Telephone Co.* v. *Commission,* 301 U.S. 292; *Jordon* v. *Massachusetts,* 225 U.S. 167; and *Morgan* v. *United States,* 304 U.S. 1.

The decision of the Circuit Court of Appeals embodies an important principle of federal law concerning which the several Circuit Courts of Appeals appear to be in conflict. *N.L.R.B.* v. *Phelps,* decided June 22, 1943; *Inland Steel Co.* v. *N.L.R.B.,* 109 Fed. (2d) 9; *Montgomery Ward & Co.* v. *N.L.R.B.,* 103 Fed. (2d) 47; *N.L.R.B.* v. *Ford Motor Co.,* 114 Fed. (2d) 905; and *Union Pacific Railway Co.* v. *Syas,* 246 Fed. 561.

The decision of the Circuit Court of Appeals in the case at bar appears to have so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision.

Wherefore it is respectfully requested that this petition for a writ of certiorari be granted.

ALLAN SESERMAN,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the Circuit Court of Appeals, filed on November 4, 1943, decreeing enforcement of the order of the National Labor Relations Board, appears in the original certified copy of the record. The order of the National Labor Relations Board appears in the same copy.

Jurisdiction.

The jurisdiction of this Court is involved under section 10 (e) of the National Labor Relations Act, 49 Stat. 449, and sections 239 and 240 of the Judicial Code as amended, U.S.C. Title 28, secs. 346 and 347.

Question Presented.

This is stated in the petition (*ante*, p. 2).

Statute Involved.

This is stated in the petition (*ante*, p. 2).

Statement of the Case.

On January 17, 1942, the Union filed its second amended charge with the National Labor Relations Board for the Second Region alleging unfair labor practices within the meanings of section 8 (1) and (3). On the 24th day of February, 1942, the Board issued its complaint alleging violations of section 8 (1) and (3) and section 2 (6) and (7). On March 23, 1942, the Union filed a supplemental

charge alleging an unfair labor practice within the meanings of section 8 (1) and (3) of the Act in regard to another employee (2-C-4125). On February 24, 1942, the Board issued its notice of hearing to be held on the 23d day of March at 10 o'clock in the forenoon at Aldermanic Chambers, City Hall, 161 Church Street, New Haven, Connecticut. Thereafter, on February 25, 1942, the respondent filed its answer to the complaint, denying the unfair labor practices charged.

A hearing was held at New Haven, Connecticut, from March 23, 1942, to April 2, 1942. On April 1, 1942, a second supplemental charge was filed by the Union, alleging unfair labor practices within the meanings of section 8 (1) and (2) of the Act. On April 2, 1942, the Board issued its amended complaint, alleging unfair labor practices within the meanings of section 8 (1), (2) and (3) and section 2 (6) and (7) of the Act. On April 2, 1942, the parties executed a stipulation disposing of the alleged violation by the respondent of section 8 (2) of the Act. On April 18, 1942, the Trial Examiner filed his intermediate report, finding violations of section 8 (1) and (3) and recommending that petitioner cease and desist from such violations and take certain affirmative actions. Thereafter the respondent granted the petitioner's request to be heard in oral argument before the Board and scheduled hearing for that purpose in Washington, D.C. Subsequently the petitioner filed exceptions to the intermediate report, requesting the Board to remand the cause to a new Trial Examiner for a new hearing, which was denied. Finally, on August 14, 1942, the respondent issued its decision and order.

Thereafter the respondent petitioned the Circuit Court of Appeals for the Second Circuit for enforcement of its order. The cause was heard on October 7, 1943, and on November 4, 1943, a decision of the Court was entered en-

forcing the order of the respondent and further ordering the petitioner to notify the Regional Director for the Second Region in writing within ten days what steps it had taken to comply with said order.

Petitioner's Position.

The petitioner's position here has been stated in the petition (*ante*, p. 2).

Argument.

The petitioner should not be ordered to comply with an order of the Board if the judicial requirements for a fair trial have not been met.

In regard to the fair hearing, the Court below had this to say: "The conduct of this trial examiner left much to be desired. Over the obvious reluctance of the Board's Attorney, he insisted upon going into a matter not covered by the charges filed. That had to do with what had been a company-sponsored association of employees, sometimes called the Plan and sometimes the Council, which turned out to have become so defunct that counsel for the board and for the respondent in the end disposed by stipulation of the apparently inconsequential issue so created. He prolonged the hearings unduly by needlessly taking over the examination of witnesses from an apparently competent attorney for the board who was present to prosecute the charges; and he generally distinguished himself for his over-speaking. *In so doing he did much to destroy any faith in his impartiality, and had this been a close case his conduct might have been sufficient cause for a denial of this petition.* Montgomery Ward & Co. v. National Labor Relations Board, 8 Cir., 103 F. 2d 147. *The result was right,* and though the trial examiner's conduct may have caused

the respondent needless trouble and expense, whatever harm was done to the cause of good administration of the Act did not make the order itself erroneous." (Italics mine.)

When the Circuit Court of Appeals in the case at bar stated that "the result was right" it took upon itself a conclusion which might have been determined entirely differently on the facts had the evidence been impartially weighed and properly presented. Thus the Court below places importance on a possible outcome on the merits, in preference to the fulfillment of the basic requirement imposed by law on the National Labor Relations Board to conduct a fair hearing. The petitioner believes that any conclusion disregarding the requirements of a fair trial on the basis that the result was right is wholly speculative and not in accord with the decided cases.

In *Tumey* v. *Ohio*, 273 U.S. 510, this Court said: "No matter what the evidence was against him, he had the right to have an impartial judge," thus sustaining the principle that a trial by a biased judge is not in conformity with due process. As this Court put it in the matter of *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292: "Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints. West Ohio Gas Co. v. Public Utilities Comm'n (No. 1), supra, p. 70; West Ohio Gas Co. v. Public Utilities Comm'n (No. 2), 294 U.S. 79; Los Angeles Gas & Electric Corp. v. Railroad Commission, 289 U.S. 287, 304. Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power

has been bestowed so freely, that the 'inexorable safeguard' (St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 73) of a fair and open hearing be maintained in its integrity. Morgan v. United States, 298 U.S. 468, 480, 481; Interstate Commerce Comm'n v. Louisville & N.R. Co., supra. The right to such a hearing is one of 'the rudiments of fair play' (Chicago, M. & St. P. Ry. Co. v. Polt, 232 U.S. 165, 168) assured to every litigant by the Fourteenth Amendment as a minimal requirement. West Ohio Gas Co. v. Public Utilities Comm'n (No. 1), (No. 2), supra; Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673, 682. Cf. Norwegian Nitrogen Co. v. United States supra. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored." Cf. *Morgan* v. *United States*, 304 U.S. 1.

In the matter of *Jordan* v. *Massachusetts*, 225 U.S. 167, this Court said: "Due process implies a tribunal both impartial and mentally competent to afford a hearing." It is the petitioner's contention that in the above-cited cases this Court leaves little doubt that "impartial" does not mean "limited partiality." It will be pointed out that the Circuit Court of Appeals in the instant case makes the first qualification affecting the partiality of a Trial Examiner based upon the fact that the Court in its opinion felt that the result was right.

In the decision in the case of *Inland Steel Co.* v. *N.L.R.B.*, decided by the Seventh Circuit Court of Appeals, the Court takes a position contrary to that taken by the Circuit Court of Appeals in the instant case. There the Court said: "And the fact that the Court's judgment may be justified on the merits does not obviate the requirement of a fair trial." *Union Pacific Railway Company* v. *Syas*, 246 Fed. 561.

This view is shared by the Circuit Court of Appeals for the Fifth Circuit in the case of *N.L.R.B.* v. *Phelps,* decided June 22, 1943, in which case that Court cites the same authorities and repeats the language of the Circuit Court of Appeals in the Inland Steel Co. case.

The same may be said of the Eighth Circuit Court of Appeals in the case of *Montgomery Ward & Co.* v. *N.L.R.B.,* 103 Fed. (2d) 47, in which case the Court, in addition to affirming the opinion of the Circuit Court of Appeals for the Fifth and Seventh Circuits, states: "This record is full of instances of hostile and searching examination of witnesses who might be expected to be favorable to the Company or the intervenor while similar action does not appear as to witnesses favorable to the complainant. The extreme activity of the examiner in questioning of witnesses is quite evident. . . . Counsel for the Board seems to have been proficient and this exaggerated participation by the examiner is not commendable—it is likely to as it did here, shade into partisan activity."

In the case below, the Trial Examiner, as in the case of Montgomery Ward & Co., appeared hostile and conducted a searching examination of the witnesses who might be expected to be favorable to the company, while similar action does not appear as to witnesses favorable to the complainant. As a matter of fact, as compared to the complete cross-examination of the petitioner's witnesses, the Trial Examiner did not ask a single question of the main witness for the complainant (Record, pp. 60-91).

We find the language of the Court below in the case at bar as follows: "There was ample evidence that both Amato and Thompson had before their discharge been active in promoting the cause of the Union and that Thompson had been elected its chief steward—all of which the management, plainly anti-union in its attitude well knew. The reason the respondent gave for the discharge of

Amato was his calling a 'Counsellor of employees,' who had the rank of a superintendent without that title, an obscene name. There was apparently credible evidence to support a finding that Amato did do just that, but he denied it and one employee seemingly near enough to have heard him, had he done so, testified that he did not hear it. The Trial Examiner saw fit to believe the denial instead of the witnesses who testified that they heard Amato call Bernstein the vile name. The Board found likewise."

The petitioner contends that, since the Trial Examiner made his findings and recommendations based upon his own conclusions (by admitting to the success of his own cross-examination of petitioner's witnesses), the Court below erred in permitting such fact-finding to be non-reviewable in the face of the petitioner's claim that it had not received a fair hearing.

As was said in *Union Pacific Railway Co.* v. *Syas*, 246 Fed. 561: "No judgment is just if not obtained by due process of law; otherwise, courts could enter judgments without trial."

There perhaps is no clearer statement of the petitioner's contention than that which is stated by the Court in the Inland Steel Co. case: ". . . The Act authorized the Board to enter an order upon the complaint alleging unfair labor practices only after a hearing. This means a trial by a tribunal free from bias and prejudice and embued with a desire to accord to the parties equal consideration. There is perhaps no more important right to which litigants are entitled than that they be given such a trial." The decision of the Court below in its entirety confuses rather than clarifies the issue and speculates on a conclusion for reasons known only to it and which emulates expediency rather than law.

By its Attorney,

ALLAN SESERMAN.